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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 950

GRANVILLE C. MORTON,

Petitioner,

vs.

KATE THOMAS, AS COMMUNITY SURVIVOR OF THE ESTATE OF W. A. THOMAS, DECEASED, FORMER COLLECTOR OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HOMER JACK FISHER,
LLOYD E. ELLIOTT,
Counsel for Petitioner.

O. D. BRUNSON,
Of Counsel.

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petition of Granville C. Morton, would respectfully show to this Honorable Court:

I

Summary Statement of the Case

This was a suit for refund of income taxes paid to the Collector of Internal Revenue at Dallas, Texas, for the years 1938 to 1941, inclusive, and alleged to be due petitioner because of the erroneous inclusion by the petitioner

in his returns for the years indicated, of income attributable to a 60% interest in a partnership known as Morton Potato Chip Company, one-half of which interest and the income therefrom belonged, by operation of law, to his daughter, Loumelia Jane Morton.

Prior to August 13, 1938, petitioner owned a 60% interest in the partnership known as Morton Potato Chip Company (R. 36). This interest was community property of petitioner and his wife. On August 13, 1938, the wife died intestate. No administration was had on her estate. Under the law of the State of Texas her community one-half of such partnership interest passed to and vested in the daughter of said marriage, Loumelia Jane Morton, then eleven years of age.

The interest of petitioner and his wife in the partnership at the time of the death of the wife was worth $25,000 (R. 34). Thereafter petitioner withdrew from the firm only such amount as was necessary for bare living expenses (R. 39), so that by accumulating the balance the Morton interest was worth $220,000 by the end of 1945.

Prior to the death of his wife, petitioner was accustomed to making joint returns for himself and his wife (R. 35). After her death he continued to return all the income attributable to the Morton 60% interest and to pay the tax due on the whole thereof until January, 1944, when he began making separate returns in which he reported one-half of the income as his daughter's. Also, at that time, he went back and filed returns for his daughter for the years 1938 to 1941, inclusive, and made claim for refund for the taxes paid by him upon the income properly taxable to his daughter upon that basis (R. 35, 37, 11, 16, 22 and 27).

Claim for refund being denied by the Commissioner on October 5, 1945 (R. 29), suit was in due time filed against the legal representative of the Collector of Internal Revenue in the United States District Court at Dallas, Texas.

Judgment for the defendant (R. 48) was affirmed by the Circuit Court of Appeals for the Fifth Circuit at New Orleans on the holding that under Section 181 of the Internal Revenue Code (26 U. S. C. A. 181) "the only persons taxable on income from a partnership are the partners," wherefore, since the daughter was not a partner, petitioner must pay the taxes on that portion of the income attributable to the interest the daughter inherited from her mother (R. 55).

II

Jurisdiction

The date of the judgment to be reviewed is December 6, 1946 (R. 56). A motion for rehearing in the Circuit Court of Appeals (R. 57-61) was overruled January 7, 1947. The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28 U. S. C. A., Sec. 347, and Supreme Court Rule 38, Sec. 5(b).

III

The Question Presented

The question here presented is whether Section 181 of the Internal Revenue Code (26 U. S. C. A., 181) (set out in full in the Appendix to the brief in support hereof), requires a partner to pay the tax attributable to the partnership interest standing in his name notwithstanding another has succeeded by operation of law to one-half of such interest.

IV

Reasons Relied on for Allowance of Writ

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for

the Ninth Circuit in *Black* v. *Commissioner* (1940), 114 F. (2d) 355.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Honorable Court, in that there is now a conflict between the Circuit Courts of Appeals on the question involved, and the decision of the Circuit Court of Appeals in this case, in holding that ownership of income, resulting from inheritance of corpus and not from mere assignment, is not the test of taxability merely because such income is partnership income, will make for interminable confusion in the administration of the law.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, commanding that court to certify and send to this Court for its review and determination, on a date certain therein to be named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 11,779, Granville C. Morton, Petitioner, *vs.* Kate Thomas, as Community Survivor of the Estate of W. A. Thomas, Deceased, Former Collector of Internal Revenue, Respondent, that said judgment of said court may be reversed by this Honorable Court, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

GRANVILLE C. MORTON,
By HOMER JACK FISHER,
LLOYD E. ELLIOTT,
Dallas, Texas.

O. D. BRUNDIDGE,
Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

The Opinion of the Court Below

The Opinion of the Trial Judge (R. 46-47) was delivered orally and has not been reported. The Opinion of the United States Circuit Court of Appeals (R. 53-56) has not been officially reported. It is reported in CCH 47-1 USTC, Paragraph 9101.

II

Jurisdiction

The basis upon which it is contended that this Court has jurisdiction to review the judgment is set forth under Paragraph 2 of the Petition to which reference is made.

III

Statement of the Case

The case has already been stated, pages 1 and 2, in the Petition, which is hereby adopted and made a part of this brief.

IV

Specification of Error

The Honorable Circuit Court of Appeals erred in holding that Section 181 of the Internal Revenue Code requires petitioner, as a member of the partnership of Morton Potato Chip Company, to return and pay a tax upon all of the income from the Morton interest in said partnership, notwithstanding his daughter had succeeded by operation of law to absolute ownership of the corpus of one-half of such partnership interest, and under the local law of Texas was the actual beneficial owner of one-half of such income.

V

Summary of the Argument

The holding of the Circuit Court of Appeals that petitioner, as a partner in the Morton Potato Chip Company, was required by force of Section 181 of the Internal Revenue Code to return all of the income attributable to the Morton interest in the partnership and pay the entire tax thereon, notwithstanding the daughter owned one-half of such interest, is in conflict with the holding of the Ninth Circuit Court of Appeals in the case of *Black* v. *Commissioner* (1940), 114 F. (2d) 355.

Argument

The Honorable Circuit Court of Appeals in this case states that: "The case is a very simple one, and we think it quite clear that the District Judge was right.

"Under the applicable provisions of the Internal Revenue Code [Sec. 181], the only persons taxable on income from a partnership are the partners. It is not claimed that Loumelia was a partner. On this record it could not be. In addition to the fact that she is a minor and can not make a binding agreement, there is not one syllable of testimony that she ever agreed, or that anybody agreed for her, to act as, or be, a partner. Morton and Mitchell are the only partners. They, and they alone, must return and pay the tax on income from the partnership."

The Ninth Circuit Court of Appeals in *Black* v. *Commissioner* (1940), 114 F. (2d) 355, construed Section 181 here involved as meaning no more than that income from a partnership was taxable to the partners in their individual capacity and not to the firm as an entity, and hence, as not requiring a partner to pay a tax upon income from the entire partnership interest standing in his name where such income was partly owned by another.

Pertinent language from the decision is found on page 359, as follows:

> "Here the partnership filed the usual information returns, but it paid, and was required to pay, no tax. Individuals carrying on business in partnership are liable for income taxes in their individual capacity only. Sec. 181, Revenue Act of 1934, c. 277, 48 Stat. 680, 730, 26 U. S. C. A. Int. Rev. Acts, p. 728. Each partner, in computing his net income, is required by Sec. 182, of the act, 26 U. S. C. A. Int. Rev. Acts, p. 728, to report his distributive share of the net income of the partnership, whether distributed to him or not.

"In view of the language of the statute, we are not disposed to interpret it as meaning that the entire amount of income distributable to a partner is taxable to him, even though half of it is owned by his wife. The better interpretation of the provisions referred to would seem to be that, in cases involving community income, the tax is imposed on the individual partner to the extent only of his ownership of the income. Compare Blair *v.* Commissioner, 300 U. S. 5, 12, 57 S. Ct. 330, 81 L. Ed. 465. This seems to be the Commissioner's construction, since Art. 181-1, Regulations 86, promulgated under the 1934 Act direct that 'if separate returns are made by the husband and wife domiciled in a community property state; and the husband only is a member of a partnership, that part of his distributive share of the partnership's net income which is community property should be reported by the husband and by the wife in equal proportions.' "

This decision of the Ninth Circuit involved an ownership by the wife of one-half of the partnership interest and its income, arising from the operation of community property laws. The ownership of the daughter in the instant case is no less, and its source is likewise the law of the domicile of the parties.

The Circuit Court of Appeals in the instant case, cites in support of its holding, that partnership income must be taxed to the partners, the decision of this Honorable Court in *Burnet* v. *Leininger,* 285 U. S. 136, whereas, the Circuit Court of Appeals in the *Black* case did not consider that *Burnet* v. *Leininger* required such holding because, said the court: "The view taken is not, we think, inconsistent with *Burnet* v. *Leininger,* 285 U. S. 136, 141, 53 S. Ct. 345, 76 L. Ed. 665. In that case there had been no transfer of the partnership assets but a mere assignment of part of the distributive share of the partner."

The Circuit Court of Appeals for the Ninth Circuit apparently took notice of the fact that this Honorable Court in *Burnet* v. *Leininger,* 285 U. S. 186, observed that

in the *Leininger* case "There was no transfer of the corpus of the partnership property to a new firm," and that, in the instant case, the "right of the wife was derived from the agreement with her husband and rested upon the distributive share which he had, and continued to have, as a member of the partnership." The Circuit Court of Appeals for the Fifth Circuit in the instant case, looking only to certain language contained in the opinion, construed the decision in the *Leininger* case as justifying the holding that Section 181 of the Internal Revenue Code requires that all of the income of a partnership must be taxed, at all events, to the partners without regard to actual ownership of such income.

There is, therefore, not only a conflict between the decisions of the Circuit Courts of Appeals as to the construction of Section 181 of the Internal Revenue Code, but likewise a conflict over the construction which this Honorable Court has placed upon such Statute.

For these reasons, and because of the confusion that would inevitably result from this improper application of the doctrine of *Burnet* v. *Leininger* to cases in which ownership of a portion of a partnership interest and its income actually lies in someone other than a partner and has been acquired by operation of law and not by assignment, and because of the confusion that would result from an attempt to apply to partnership income a rule different from that governing in the case of beneficial ownership of income generally, this Honorable Court should grant the writ of certiorari, and thereafter review and reverse the decision of the Honorable Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

Sect. 181. Partnership not taxable

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. 53 Stat. 69.

Sect. 182. Tax of partners

In computing the net income of each partner, he shall include whether or not distribution is made to him—

(a) As part of his gains and losses from sales or exchanges of capital assets held for not more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for not more than 6 months.

(b) As part of his gains and losses from sales or exchanges of capital assets held for more than 6 months, his distributive share of the gains and losses of the partnership from sales or exchanges of capital assets held for more than 6 months.

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b). 53 Stat. 69, as amended Oct. 21, 1942, 4:30 p. m., E.W.T., c. 619, title 1 Sec. 150(g) (1), 56 Stat. 845.